

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

JELANI E.

Petitioner,

vs.

SAN GABRIEL POMONA REGIONAL  
CENTER,

Respondent.

OAH No. 2006040046

(Early Intervention Services Act  
Gov. Code, § 95000 et seq.)

**DECISION**

Administrative Law Judge Deborah Myers, Office of Administrative Hearings, heard this matter in Pomona California, California on May 16 and May 23, 2006.

The San Gabriel Pomona Regional Center (Service Agency) was represented by Daniela Martinez, the Director's Designee for Due Process Hearings.

Jelani E. (Petitioner) was represented by Otis E., Petitioner's father.

The matter was submitted on May 23, 2006.

**ISSUE**

The parties stipulated to the following issues:

1. Whether Foothill Pre-School (Foothill) is appropriate to meet Petitioner's instructional needs; and
2. Whether the Service Agency should be required to pay for Petitioner to attend Foothill three mornings a week as a specialized instructional aid for Petitioner.

## FACTUAL FINDINGS

1. Petitioner was born on November 13, 2003. She is approximately two and one half years old. Petitioner is a consumer of the Service Agency under the Early Start program.<sup>1</sup> She is significantly developmentally delayed in the areas of cognitive acuity and expressive and receptive communication. Petitioner resides with her father and mother; her father has a master's degree and is a self-employed speech pathologist; her mother has a master's degree and is a kindergarten teacher. Petitioner's grandmother provided daycare for her for two years. Petitioner now attends Foothill as her day care.

2. On January 11, 2006, at age 26 months, an occupational therapist at the Service Agency assessed Petitioner and found her to be developmentally delayed in three areas. The Mental Scale of the Bayley Scales of Infant Development II placed Petitioner's cognitive skills at 17 months. The Motor Scale of the Bayley Scales of Infant Development II placed her skills at 22 months. Using cognitive and language skills tests, Petitioner was found to be at the level of 17.3 months as follows: cognitive functions at age 17 months; gross motor functions at age 22 months; fine motor functions at age 18 months; social functions at age 18 months; and personal functions at age 18 months.

3. Also on January 11, 2006, a speech-language pathologist at the Service Agency assessed Petitioner. The Rosetti Infant Toddler Scale was used to determine her communication delays. Petitioner's comprehension of verbal and gestured language was at the nine month level. Her expressive language was at the nine to twelve month level. Petitioner's speech production skills were in the nine to twelve month range.

4. On February 13 and 26, 2006, an independent speech and language pathologist assessed Petitioner. The Pre-school Language Scale-4 was used to assess her receptive and expressive language abilities. Her auditory comprehension was assessed at one year six months; and her expressive communication was assessed at one year nine months, for a combined language score of one year seven months. Petitioner made multiple articulation errors that significantly reduced the intelligibility of her speech. She exhibited several features of developmental apraxia.

5. On March 15, 2006, a licensed physical therapist assessed Petitioner to determine her gross motor development. Petitioner's muscle tone, motor control, strength, endurance, and coordination were measured and found to be at age appropriate levels. She demonstrated good equilibrium/balance reactions and functional mobility. Petitioner used poor sitting postures, walked with mild gait deficits, was flat-footed and suffered in-toeing. Her gross motor skills were determined to be between age 24 and 30 months. Physical therapy intervention was not recommended, although foot orthoses were recommended.

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<sup>1</sup> IDEA Part C and California Code of Regulations, title 17, sections 52000 et seq.

6. On March 26, 2006, a behavior assessment was performed on Petitioner because of her severe tantrums, which her parents believed were precipitated by her lack of expressive communication. The assessor made recommendations for training the parents in behavior intervention techniques.

7. On January 23, 2006, the Service Agency and Petitioner's parents developed an Individualized Family Service Plan (IFSP) to state the goals for Petitioner and to identify the services and supports she needed to reach them. The IFSP, and its later addendums, provided for Petitioner to receive Early Intervention Services consisting of occupational therapy twice a week for one hour at a clinic; speech therapy twice a week for one hour at the family home; behavior intervention 10 hours a month at home; and specialized instruction through a pre-school program with specialized modifications in the form of an inclusion support specialist to foster Petitioner's emerging skills.

8. Foothill is Petitioner's preferred vendor for the structured educational program. Petitioner is enrolled in that pre-school between three and five days a week. Foothill is not vendored by the Service Agency to provide specialized instruction, nor has it applied to be so vendored. Therefore, the Service Agency will not pay for Foothill to provide Petitioner with infant development specialized instruction services. However, Foothill is vendored by the Service Agency as a day-care facility. The Service Agency considers Foothill to be a "natural and typical environment" for children and will not fund the tuition.

9. The Service Agency describes Foothill as a "natural environment." This means that it is a typical daycare program provided to the community of normally developing peers, which does not segregate developmentally delayed children from normally developing children. According to the Service Agency, OSEP will not permit them to fund this "natural environment" as an infant development specialized instruction program. They may only fund the services that support a consumer in this "natural environment." The evidence did not establish that the Service Agency was similarly forbidden from paying for Petitioner to attend Foothill as a day-care facility and also providing an inclusion specialist and other support services.

10. Petitioner attends Foothill between three and five days a week from 7:30 to 3:00 p.m.. Foothill's monthly day care rate is \$650.00 for Petitioner to attend five days a week. Petitioner's father has paid the tuition at a financial hardship to himself and his fiancée. They want the Service Agency to pay for Petitioner's program until the school district takes over her educational services at age three years. The evidence did not establish that Petitioner's parents ever requested the Service Agency to pay for day-care for petitioner at foothill. The evidence did not establish whether the Service Agency would be obligated to pay for Foothill as a daycare and also be able to pay for the inclusion specialist they are currently able to fund. The evidence did not establish whether the Service Agency would require Petitioner's parents to pay a portion of those day care costs.

11. The Service Agency asserts that the Early Start program requires approved specialized instruction vendors to comply with the IDEA Part C and with California Code of Regulations (CCR), title 17, sections 52000 et seq., due to federal and state funding requirements which means that they are unable to pay for Foothill's tuition as specialized instruction. Vendors of specialized instruction are required to submit a program design (CCR section 56762 and 56712), develop program curriculum (CCR sections 56764), provide a revised consumer service plan every three months (CCR section 56720), meet educational qualifications (CCR section 56770), have a staffing ratio of three students to one instructor (CCR section 56772), and train their staff in child development curricula and in the early intervention service system for at-risk and handicapped children (CCR section 56774). The Service Agency is monitored every two years by OSEP.<sup>2</sup> In order to keep their federal and state funding, the Service Agency must have complied with Early Start laws and regulations.

12. The Service Agency referred Petitioner to a number of approved specialized instruction vendors which comply with the IDEA and the CCR standards, including Covina Development Center (Covina). The hourly rate of the Covina facility is \$31.78, which is far higher than Foothill's monthly cost. However, the Service Agency believes that Petitioner's needs are paramount, not the cost of delivering those services.

13. The Service Agency believes that Covina, or another equivalent vendored specialized instruction program, is the most appropriate pre-school setting to meet Petitioner's developmental delays. However, the Service Agency acknowledged that Petitioner's day care setting, with appropriate supports and services such as an inclusion specialist, would also assist Petitioner with her IFSP goals and address her developmental delays.

14. Therefore, the Service Agency offered to support Petitioner in her pre-school of choice by providing at Foothill an inclusion specialist, to allow this pre-school to meet the goals and benchmarks of the IFSP. To that end, Carousel Development Services (Carousel) provided an inclusion consultation report for Petitioner. Carousel recommended 10 hours of inclusion support per month at Foothill for the next five months, to be re-assessed in October 2006. This inclusion support is scheduled to begin in June 2006. Additionally, Petitioner is provided with a behavior specialist, and a speech and language therapist at home and a clinic.

15. Petitioner's father believes Foothill's "natural environment" is highly beneficial to Petitioner. She is blossoming in this non-segregated environment of inclusion with typically developing peers. Petitioner's parents do not want Petitioner moved from an environment of proven success to an unknown environment such as Covina.

16. Petitioner's father is not satisfied with Covina and has concerns about the safety of some play areas, which he has shared with the Service Agency. Petitioner's service

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<sup>2</sup> Office of Special Education Programs

coordinator offered several options for equivalent specialized instruction programs, including providing referrals to other approved vendors in Petitioner's cachement area; providing home schooling for her with specialists' support; or providing inclusion specialists to assist Petitioner at Foothill. Petitioner's service coordinator's ID notes memorialized a conversation with Petitioner's father informing him that Foothill was "vendored under day care and not a[n] infant program specialized to meet the educational, social, [and] emotional needs of children with special/developmental delays." The Notice of Proposed Action, dated March 23, 2006, demonstrated the Service Agency's willingness to "provide an infant/child development specialist to assist the day care program staff to individualize their activities to support [Petitioner's] growth in the areas of speech, social skills and cognition while she is in the day care setting. This person could also go into your home and provide individual instruction to [Petitioner] and to the family."

17. Petitioner's parents are pleased with the progress Petitioner has made at Foothill. Petitioner's father describes her as "a different child." She has made headway in her expressive speech. He believes their curriculum is appropriate to meet Petitioner's IFSP goals and benchmarks by assisting with her cognitive and communicative delays. Carousel's Inclusion Consultation Report noted that Petitioner is exploding in expressive verbalization, is improving her fine and gross motor skills, and is improving in her small group activity.

18. Petitioner did not establish that the Service Agency thwarted the purpose of Early Start laws and regulations by causing an unreasonable delay in the delivery of needed services. The Service Agency acted reasonably and timely by seeking to accommodate Petitioner's pre-school preference.

## LEGAL CONCLUSIONS

1. California has enacted the California Early Intervention Services Act (Act) "...to provide appropriate early intervention services individually designed for infants and toddlers from birth through two years of age, who have disabilities or are at risk of having disabilities, to enhance their development and minimize the potential for developmental delays." Government Code § 95001, subdivision (a)(1). The Legislature has found that early intervention services "...maximize the ability of families to better provide for the special needs of their child." Government Code § 95001, subdivision (a)(2). This state's lawmakers also found that meeting the needs of infants with disabilities and their families requires appropriate services that are responsive to "family identified needs." Government Code §§ 95001, subdivision (a)(5) and 95002. These are required to support and enhance the families' capability to meet the special developmental needs of their infant or toddler. Government Code § 95001, subdivision (a)(3).

2. Government Code §95004 specifies that early intervention services "... **shall be provided** (emphasis added)," in pertinent part, as follows:

(a) Direct services for eligible infants and toddlers and their families **shall be provided** (emphasis added) pursuant to the existing regional center system under the Lanterman Developmental Disabilities Services (Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code). . . .

(c) Services shall be provided by family resource centers that provide, but are not limited to, parent-to-parent support, information dissemination and referral, public awareness, family professional collaboration activities, and transition assistance for families. . . .

(e) It is the intent of the Legislature that services be provided in accordance with Sections 303.12 . . . of Title 34 of the Code of Federal Regulations.

3. Code of Federal Regulations (CFR), title 34, section 303.12, provides in pertinent part, that early intervention services means that they are. . .

(1) Designed to meet the needs of each child eligible . . . to enhancing the child's development; and, . . .

(3) Are provided . . .

(iii) In conformity with an individualized family service plan; and,

(iv) At no cost, unless, subject to section 303.520(b)(3), Federal or State law provides for a system of payments . . . including a schedule of Sliding fees . . . .

4. CCR, title 17, section 52000 et seq. encodes the forth the provisions of Early Intervention Services. Section 56700 et seq. sets forth the quality assurance standards for all community-based day programs. Section 56712, subdivision (a) provides all vendored community-based day programs must submit a program design to the Service Agency which identifies the purpose and goals of the service along with the anticipated consumer outcomes resulting from participation in the program stated in measurable terms.

5. CCR, title 17, section 56760 et seq. sets forth the additional requirements for infant development programs. Section 56762 establishes that an infant development program must provide a program design which also includes written procedures used by the program for review of consumer assessment information, including occupational and physical therapy, speech pathology and psychological services. Section 56764 requires that the program curriculum for infant development programs be developed to include intervention activities promoting physical, cognitive, language and speech, psychological, self-help and feeding development. The program curriculum must also include activities which increase parent and child interaction through training the parents to recognize and respond to the child's unique needs, daily living skills, and appropriate activities.

6. CCR, title 17, section 56770 sets forth the personnel qualification of an infant development program. The director must possess a bachelor's degree and 18 months experience, or five years experience in the human services delivery system. The supervisor must possess three years experience and one year of study toward a bachelor's degree. Section 56772 sets a direct care staff-to- consumer ratio of 1:3 in a group setting. Section 56774 requires that staff be trained in child development intervention curricula and techniques, as well as the early intervention service system for at-risk and/or handicapped children.

7. The Service Agency can only fund a specialized instruction vendor who meets these criteria. The Service Agency has made several specialized instruction vendor referrals to Petitioner. The Service Agency has provided Petitioner the option of home-schooling instruction with inclusion specialists to satisfy the IFSP. The Service Agency has provided Petitioner the option of inclusion specialists at Foothill, Petitioner's choice of a "natural environment."

8. Foothill is not vendored as specialized instruction by the Service Agency, but is vendored as day-care by the Service Agency. The Service Agency cannot pay for Foothill as specialized instruction under the IDEA and the CCR standards. However, the Service Agency can fund Foothill as a day-care facility for Petitioner and is not precluded from also providing inclusion support. The evidence only established the Service Agency could not pay for Foothill as specialized instruction, although it could provide supportive services there.

9. Petitioner's family needs day-care because both of Petitioner's parents work outside the home. While Petitioner's day-care needs were originally met by her grandmother, Petitioner is now attending Foothill which is vendored as a day-care facility. Petitioner's parents have stated that paying the tuition has been a financial hardship to them. Because the evidence failed to establish whether the Service Agency could legally pay for Petitioner to attend Foothill as a day-care facility and also pay for supportive services; or if it could pay for such day-care, whether Petitioner's family would need to pay a portion of the day-care costs, the ALJ cannot definitively resolve the pending issues.

10. Although the Service Agency prefers a specialized instruction vendor to meet Petitioner's IFSP goals, they have creatively developed a functionally equivalent program supporting the family's preference: a typical day care with an inclusion specialist. The Service Agency acted appropriately and did not cause unreasonable delay in providing Petitioner with needed services. Therefore, restitution is not appropriate in this case.

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## ORDER

1. The Service Agency shall not pay for Foothill as specialized instruction.
2. The Service Agency shall convene for a new IFSP for Petitioner within ten days of this Order to determine whether the Service Agency should pay for Petitioner to attend Foothill as day-care; whether Petitioner's parents are required to pay a portion of those day-care costs; and whether the Service Agency is able to additionally fund the inclusion specialist at Foothill as a day-care vendor.

DATED: June 6, 2006

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DEBORAH MYERS  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE

**This is a final administrative adjudication decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.**